(A)

No. 97-2057-CSY Title: James Arthur Danner, Petitioner
v.
Kentucky

Docketed: June 22, 1998 Court: Supreme Court of Kentucky

Entry	Date	Proceedings and Orders
	May 11 1998	Application (A97-845) to extend the time to file a petition for a writ of certiorari from May 20, 1998 to June 19, 1998, submitted to Justice Stevens.
	May 13 1998	Application (A97-845) granted by Justice Stevens extending the time to file until June 19, 1998.
	Jun 19 1998	Petition for writ of certiorari filed. (Response due July 22, 1998)
	Jul 15 1998	Waiver of right of respondent Kentucky to respond filed.
	Jul 22 1998	DISTRIBUTED. September 28, 1998
	Sep 2 1998	Response requested.
	Sep 24 1998	Brief of respondent Kentucky in opposition filed.
	Oct 7 1998	REDISTRIBUTED. October 30, 1998
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	REDISTRIBUTED. November 13, 1998
	Nov 16 1998	Petition DENIED. Dissenting opinion by Justice Scalia, with whom Justice Thomas joins. (Detached opinion.)

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Supreme Court, U.S.
FILED

972057 JUN 19 1998

OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES ARTHUR DANNER,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petitioner's Sixth Amendment right to confront witnesses was violated by allowing the alleged child sex crime victim to testify by closed circuit television

II. Whether KRS 421.350 violates one's Sixth Amendment right to confront witnesses and whether its application by the Trial Court was Constitutional

III. Whether the Supreme Court of Kentucky's opinion in *Danner v. Commonwealth of Kentucky*, 963 S.W. 2d 632 is in conflict with existing federal case law.

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OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky appears at Appendix A to the Petition and is reported at 963 S.W. 2d 632.

STATEMENT OF JURISDICTION

The judgement sought to be reviewed was rendered by the Supreme Court of Kentucky on February 19, 1998.

The Petitioner filed an application for an extension of time within which to file a Petition for a Writ of Certiorari. The Petition was filed on May 11, 1998, and directed towards Justice John Paul Stevens of the United States Supreme Court as the Justice on behalf of the Sixth Circuit. On May 13, 1998, Justice Stevens extended the time for the Petitioner to file his Petition for Writ of Certiorari to and including June 19, 1998.

The jurisdiction of this Court is invoked pursuant to 28 USC section 1257. The final disposition of the case below was of the Court of last resort of the Commonwealth of Kentucky, being the Supreme Court of Kentucky.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

STATEMENT OF THE CASE

The Petitioner, James Arthur Danner, was indicted by the Boyd County Grand Jury, Commonwealth of Kentucky, on February 9, 1996. The indictment charged the Petitioner with

two counts of first-degree sodomy and one count of first-degree rape of his daughter.

The events allegedly occurred while the victim was between the ages of five and nine. The acts allegedly took place between 1986 and 1990. The trial by jury occurred on November 4, 1996. The alleged victim was fifteen years old at the time of trial.

The Petitioner was convicted of two counts of sodomy in the first-degree, and one count of rape in the first-degree. He was sentenced to twenty-four years of imprisonment on each count to run concurrently for a total of twenty-four years. He remains incarcerated within the Commonwealth of Kentucky Department of Corrections system.

As in most jurisdictions, the Commonwealth of Kentucky has a statute which allows under certain circumstances, for the trial testimony of an alleged child sex victim to be taken by closed circuit television or taped video recording. KRS 421.350. The pertinent part of the statute states:

> (1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.030 to 529.050, 529.070, 530.020, 530.060, 530.064, 531.310, 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

> (2) The court may, on motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the Courtroom and be televised by closed circuit equipment in the Courtroom to be viewed by the Court and the finder of fact in the proceeding. Only the attorneys for the Defendant and for the State, persons necessary to operate the equipment, and any person whose presence the Court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The Court shall permit the Defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the Defendant.
>
> (3) The Court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by the subsection

(3) of this section. The Court shall permit the Defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the Defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken.

(5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

At trial, the Commonwealth of Kentucky moved for an in camera interview with the alleged child victim pursuant to the statute. The Petitioner objected. The Trial Court sustained the Commonwealth's motion and interviewed the victim in

camera. After the interview, the Trial Court allowed the victim to testify through closed circuit television.

The Petitioner appealed his conviction directly to the Supreme Court of Kentucky as a matter of right.

The basis of the Petitioner's appeal was that the Trial Court erred in sustaining the Commonwealth's motion to allow the child to testify by closed circuit television and the Constitutional argument that the closed circuit testimony violated the Petitioner's right to confrontation under the Sixth Amendment of the United States Constitution. The Sixth Amendment's confrontation clause "guarantees the Defendant a face-to-face meeting with witnesses appearing before the trier of fact. *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2801 101 L.Ed. 2d 857 (1988). U.S.C.A. Amend.6.

The Supreme Court of Kentucky affirmed the Petitioner's conviction on February 19, 1998, in a published opinion. *James Arthur Danner v. Commonwealth of Kentucky*, 963 S.W.2d 632 (1998).

In the published opinion, the Supreme Court of Kentucky noted that as to the age provisions of the statute, "The statute must be regarded as ambiguous."*Id.* at 634. The Kentucky Supreme Court stated "One portion clearly refers to the age of the victim when the act is committed, but another portion refers to the age of the victim when the testimony is given. The statue assumes the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial."*Id.*

The Supreme Court of Kentucky obviously found the age provisions in KRS 421.350 which allowed the alleged victims testimony outside of the presence of the Defendant to be

ambiguous on it's face. The Supreme Court justified the Trial Court's application of the statute in spite of the ambiguity by creating and presuming legislative intent "to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial." *Danner* at 634.

The Kentucky Supreme Court engaged in this analysis without a balancing or even discussion of Mr. Danner's United States Sixth Amendment Constitutional right to confrontation of witnesses with a preference for face-to-face confrontation at trial. *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In *Maryland*, the Court balanced the conflicting interests of face-to-face confrontation with that of public policy considerations and the state's interest in protecting child witnesses from the trauma of testifying. However, as noted by *Maryland*, and indeed by federal statute, 18 USCA section 3509 (b)(1)(B), both the federal statute and the United States Supreme Court decision of *Maryland v. Craig, supra*, indicate that the confrontation clause of the Sixth Amendment requires a more stringent finding than that of both KRS 421.350 and the Kentucky Supreme Court. More particularly, the federal statute and *Maryland* case require more specific findings of compelling need than that engaged in by the Trial Court in the case at bar.

The Commonwealth of Kentucky, is of course, within the Sixth Circuit. The Sixth Circuit recognizes, (as it must) in cases involving child sex crime witnesses, the need for expert testimony on the issue of the likelihood of the child suffering emotional trauma from testifying in open court. Such an inquiry involving experts is necessary in order to protect a Defendant's Sixth Amendment rights *United States v. Moses*, 1998 W.L. 78164 (6th Cir 1998).. In the case at bar there was

no expert testimony on this issue.. The Trial Court engaged in the limited inquiry as to whether there was a compelling need to have the child witness testify by closed circuit television with the following inquiry:

"... Q. Why is it that him being there in the room would make you unable to tell your side?

A: I don't know. I just can't. I just can't be near him.

Q. We've already talked about that you're not afraid of him, are you?

A. No.

Q. I know it's difficult to exactly put a finger on what it is about; but why do you think that you could tell when he's not in the room but you couldn't tell it with him in the room?

A. I don't know. I just can't be near him. I don't know why. I just can't.

Q. Do you think that if you were to try and you know if we had to take breaks or something, you would be able to do it?

A. I don't know.

The Court: The Court finds that due to factors which I cannot define but yet go much further than anxiety or nervousness, as referred to the various cases that have been cited, that compelling need exists for the use of the electronic equipment. And although I am not making this decision simply for the witnesses convenience, or to prevent her from being nervous or anxious, as that no doubt happens to all

witnesses, the Court is convinced that due to the nature of testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded" Transcript of Evidence, Vol. 1, page 60.

In direct response to *Maryland v. Craig, supra*, Congress passed the Child's Victim and Child Witnesses Right's Act, 18 USCA section 3509, which sets forth the conditions under which a child may testify by closed circuit television. The Act states, in pertinent part: (B) The Court may order that the testimony of the child be taken by closed circuit television...if the Court finds that the child is unable to testify in open court, in the presence of the Defendant, for any of the following reasons: (i) The child is unable to testify because of fear. (ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying. (iii) The child suffers a mental or other infirmity. (iv) The conduct by Defendant or defense counsel causes the child to be unable to continue testifying."18 USCA section 3509.

In the case at bar, there was no expert testimony established that the child would suffer emotional trauma from testifying. She obviously was not unable to testify because of fear because she told the Trial Court that she was not afraid of the Defendant. There was no finding on the record that the child suffered a mental infirmary that would influence her testimony. There was no indication of conduct by the Defendant or his counsel that would cause a child witness to be unable to testify.

The Kentucky Supreme Court compounded the Trial Court's error by not engaging in any analysis whatsoever of the sufficiency of the Trial Court's findings balanced with the Petitioner's right to confront witnesses under the Sixth

Amendment of the United States Constitution. The Kentucky Supreme Court seized upon a presumed legislative intent to justify the Trial Court's decision in this case without reference to the federal question involved. The United States Court of Appeals for the Sixth Circuit and the United States Supreme Court has decided this issue as well as Congress in a way that conflicts with the decision issued by the Kentucky Supreme Court in the case at bar.

REASONS FOR GRANTING THE WRIT

The Petitioner is fully aware of the burden he carries in order for this Court to grant review on a Writ of Certiorari. It is not a matter of right, but of judicial discretion. A Petition for Writ of Certiorari will be granted only before compelling reasons. Supreme Court Rule 10.

In the case at bar, the Kentucky Supreme Court has decided the important federal question of James Danner's right to face-to-face confrontation with an accusing witness in a way that has conflicted with the decision of the United States Supreme Court as well as the United States Court of Appeals for the Sixth Circuit. The United States Supreme Court's supervisory power should also be called to act because the Trial Court and Kentucky Supreme Court departed from accepted standards of judicial proceedings in regard to the application of KRS 421.350 and as to the Trial Court's inquiry to the alleged victim's ability to testify in open court and thereby misapplied the Kentucky statute as well as federal decisions interpreting one's Sixth Amendment rights. For these reasons, there is a compelling need for this Court to take review of this case.

The Petitioner is serving a twenty-four year sentence in the Kentucky penal system. His imprisonment is as a result of the Trial Court's defective analysis, both factually and

legally under KRS 421.350 complicated by the Kentucky Supreme Court's usurption of legislative power by interpreting legislative intent by clearly disregarding the age reference of twelve years of age or younger as indicated in the statue and injecting it's own presumptions as to legislative intent. Had the Kentucky legislature intended the statute to provide solely upon the victim's age at the time the alleged acts were to have occurred, it would have done so. The statute clearly shows to whom the protections are afforded. They are afforded to children age twelve and under. As the alleged victim exceeded this parameter at the time of trial, KRS 421.350 cannot be applicable legally. To accept the Kentucky Supreme Court's interpretation of the statute would mean that an alleged sex crime victim at age twenty-five or older could testify by closed circuit television if the alleged acts occurred while the victim was twelve years old or younger. The Kentucky Supreme Court's decision, if taken to it's ultimate conclusion, is *reductio ad absurdum*.

Besides the defective legal analysis engaged in by the Kentucky Supreme Court and by the Trial Court, the Trial Court also violated the Defendant's Sixth Amendment confrontational rights by engaging in a factually flawed analysis. This court may review factual findings for clear error. *Hernandez v. New York*, 500 US 352, 364, 111 S.Ct. 1859, 114 L.Ed. 2d. 395 (1991). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 746 (1948), *Bartling v. Fruehauf Corp.*, 29 Fd. 3d. 1062, 1067, (6th Cir 1994).

If this Court reviews the Trial Court's inquiry to the child witness, it would be left with a definite and firm

conviction that the Trial Court mistakenly permitted the child witness to testify by closed circuit television. First, the child witness' own testimony to the Trial Court disavowed any fear of the Defendant. The child witness simply did not want to be in the same room with the Defendant. This is not the same type of potential trauma and fear which must be shown before closed circuit testimony can be taken in lieu of open court testimony. A general fear of the courtroom is insufficient. *United States v. Rouse*, 111 Fd. 3d. 561, 568 (8th Cir. 1997).

As indicated, the landmark case in reconciling the types of statutes at issue with one's Sixth Amendment rights is *Maryland v. Craig, supra*. In *Maryland*, the court noted that the confrontation clause reflects a preference for face-to-face confrontation at trial which must occasionally give way to considerations of public policy in necessities of the case. *Maryland* at 849. The *Maryland* Court approved the use of closed circuit television for child witnesses upon an adequate and case specific showing of necessity. The Court stated that the Trial Court must "hear evidence and determine whether use of the one way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Maryland* at 855. In addition, the Trial Court must find "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the Defendant."*Id.* at 856. The Trial Court must find that the level of emotional distress suffered by the child witness as a result of testifying in the Defendant's presence "is more than *de minimus*... or some reluctance to testify"*Id.* In the case at bar, the Trial Court engaged in no type of evidence adducing procedure. The Trial Court engaged in an in camera discussion with the child witness and stated on the record that he felt the compelling need for reasons he could not define.

The child witness stated that she was not afraid of the Petitioner. In *United States v. Moses*, the Sixth Circuit Court of Appeals reversed the Trial Court's allowance of a child witness to testify by closed circuit television when the child witness stated that she was not afraid of the Defendant.

This Court should take review of this case because of the magnitude of the Constitutional issue in question. This is especially true in light of the Kentucky Supreme Court's ruling and the statute involved. Both are repugnant to this Court's prior rulings as well as rulings of the Sixth Circuit.

The Sixth Amendment of the United States Constitution has been held to prevent the abuses of the English Court system of the late middle ages. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). The rights under the Sixth Amendment are applicable to the states. *Poynter v. Texas*, 380 U.S. 400, 855 at 1065, 13 L.Ed. 2d. 923 (1965).

This Court should review this case in order to keep intact the intent of the founding fathers and framers of the United States Constitution. The United States Constitution and the Bill of Rights are the foundation of the judiciary. It's framers could not have contemplated the great leaps in technology which have followed since the drafting of the Constitution. Television unquestionably captures much, but it cannot capture all. It is, at best, a reproduction of life. As such, it is a distortion thereof. Therefore, this Court should scrutinize statutes and state court decisions as well as Trial Court's application of these statutes when such matters conflict with or may not be entirely consistent with, the decisions of this Court as well as other federal courts and most importantly, with the intent of the framers of the Sixth Amendment of the United States Constitution.

The federal question of the Petitioners Sixth Amendment rights in regard to the application of KRS 421.350 was timely and properly raised at various places in the record so that this Court has jurisdiction to review the Supreme Court of Kentucky's judgment affirming the conviction on a Writ of Certiorari.

Prior to trial, on October 30, 1996, the Commonwealth of Kentucky moved the Trial Court for an in camera interview with the alleged child victim in order to allow her to testify by either closed circuit television or by videotape. The Petitioner filed a response to the Commonwealth's motion. The motion and response appears in Volume II, on page 40 and 50, respectively. A hearing on this motion was held November 4, 1996. This appears in Volume I of the record on pages 4 through 38. Of course, the Trial Court ruled in favor of the Commonwealth and elected to interview the child witness in camera. The interview was held November 4, 1996. It appears on Volume I of the record on pages 44 through 62.

Trial began on November 7, 1996. Petitioner renewed his objections to the closed circuit television testimony and was again overruled. This appears on Volume I of the record on pages 62 through 65. After the Commonwealth rested, the Petitioner renewed his objections to the use of closed circuit television and moved for directed verdict. This appears on Volume I of the transcript on pages 139 through 147. The Trial Court overruled the motion for directed verdict and the Petitioner moved the Trial Court to make a finding on the Constitutionality of KRS 421.350 as it affects the Petitioners's Sixth Amendment rights of confrontation. The Trial Court entered a finding that the statute and it's application, was Constitutional and did not abrogate the Petitioner's Sixth Amendment rights to confrontation. This appears on Volume I of the record, pages 147 through 150.

CONCLUSION

Wherefore, the Petitioner, James Arthur Danner, requests this honorable Court and petitions this honorable Court for a review of the Kentucky Supreme Court's decision in *James Arthur Danner v. Commonwealth of Kentucky*, 963 S.W.2d 632 (1998).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Cite as: 963 S.W.2d 632)

SUPREME COURT OF KENTUCKY
No. 96-SC-1136-MR

James Arthur DANNER,

Appellant,

v.

COMMONWEALTH of Kentucky,

Appellee.

Feb. 19, 1998.

LAMBERT, Justice.

Appellant, James Arthur Danner, was convicted in the Boyd Circuit Court of two counts of sodomy in the first degree, and one count of rape in the first degree. He was sentenced to twenty-four years imprisonment on each count to run concurrently for a total of twenty-four years imprisonment. He appeals as a matter of right.

The victim of appellant's sex crimes was his daughter. She was between the ages of five and ten years old when appellant sexually abused her, but she was fifteen by the time appellant was brought to trial. Because the Commonwealth felt that the victim could not testify in the presence of appellant, it sought to have her testimony taken outside appellant's presence pursuant to KRS 421.350. The Commonwealth moved for an in camera interview with the victim so that the court could determine whether there was

"compelling need" for the victim to testify through closed circuit television or taped video recording pursuant to that statute. Appellant objected, arguing that the fifteen year old victim was too old under the statute to be allowed to testify outside the courtroom, and even if not, that the Commonwealth had failed to establish the required compelling need for her testimony to be taken in that manner.

The trial court granted the Commonwealth's motion and interviewed the victim in camera. After the interview, the trial court determined that compelling need was shown and allowed the victim to testify through closed circuit television.

I. THE AGE PROVISION OF THE STATUTE

The first issue is whether the age provisions of KRS 421.350 refer to the age of the victim when the crime was committed or when the testimony is given. See generally, *Commonwealth v. Willis, Ky.*, 716 S.W.2d 224 (1986). KRS 421.350(1) defines the class of persons allowed to testify outside the presence of the accused:

> 421.350 Testimony of child allegedly victim of illegal sexual activity
>
> (1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.030 to 529.050, 529.070, 530.020, 530.060, 530.064, 531.310. 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve(12) years of age or younger who witnesses one of the offenses included in this subsection.

The Commonwealth and appellant disagree on when the age determination is to be made. The Commonwealth focuses on the age of the victim at the time the crime was committed, and contends that since the victim in this case was under twelve when the crimes were committed against her, she should be allowed benefit of the statute. Appellant focuses on the age of the victim at the time of the trial, and counters that a victim who is older than twelve at the time of trial can not so testify.

As applied to the facts of this case, the statute must be regarded as ambiguous. One portion clearly refers to the age of the victim when the act is committed, but another portion refers to the age of the victim when the testimony is given. The statute assumes the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children[1] at the time of trial. The statute does not preclude this interpretation and its language focuses on the age of the child when the crime was committed: "[t]his section applies ... when the act is alleged to have been committed against a child twelve years of age or younger ..." KRS 421.350(1). To hold otherwise

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[1] Although "child" is not defined for the purposes of KRS Chapter 421, "child" has been defined in other KRS sections as a person who has not yet reached her eighteenth birthday. KRS 15.900, KRS 199.011, and KRS 600.020.

would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes were committed, but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.[2]

II. THE TRIAL COURT'S FINDING OF COMPELLING NEED

The trial court's inquiry does not end with an age determination. Rather, the court must also find compelling need for such procedures, as required by KRS 421.350(2),(3) before the child victim will be allowed to testify as per the statute. This Court has enumerated certain factors a trial court should consider in making a compelling need determination: "the trial court must have wide discretion to consider the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant." *Commonwealth v. Willis, Ky.*, 716 S.W.2d 224, 230 (1986) (emphasis added). Other factors a trial court should consider when making a compelling need determination, especially in a case where the child is older than twelve, are the age of the victim, and the time which has elapsed from the crime to the date of trial.

---

[2] This statute is in line with the special treatment Kentucky courts have long afforded child witnesses. *See Meredith v. Commonwealth*, 265 Ky. 380, 96 S.W.2d 1049 (1936); *Peters v. Commonwealth, Ky.*, 477 S.W.2d 154 (1972); *Commonwealth v. Willis, Ky.*, 716 S.W.2d 224 (1986). The statute itself was recently broadened so that now, in addition to child victims, child witnesses may also testify outside the presence of the accused. 1996 Ky. Acts ch. 178, sec. 1, effective July 15, 1996.

The trial court has broad discretion in this area. The "presentation of evidence" is within the sound discretion of the trial judge, and will not be disturbed absent abuse of discretion. *Moore v. Commonwealth, Ky.*, 771 S.W.2d 34, 38 (1989), *cert den.*, *Moore v. Kentucky*, 494 U.S. 1060, 110 S.Ct. 1536, 108 L.Ed.2d 774 (1990). Abuse of discretion could be found where a child was allowed to testify outside the presence of the accused provided "the prosecution [was] unable to show any necessity for the use of the statute." *Willis, supra* at 229-230.

In the case at bar, the trial court interviewed the child victim in camera, and then determined that compelling need justified the use of KRS 421.350 procedures. The trial court considered the testimony the child would give at trial, and the age of the child in making its determination. The Court stated: "... the Court is convinced that due to the nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded." The trial court was convinced that the victim would not be able to testify in the presence of appellant, and in the interest of presenting all evidence to the jury it made the determination of compelling need:

> the compelling need is not based on convenience or comfort level of the witness so much as it is the need to be able to disclose the testimony so that the jury itself can determine whether they want to accept or reject same or what weight should be given.

This Court has similarly held that where the trial judge found that the child would not testify as to the offense and was reluctant to testify in the presence of the accused, that

"... putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony. (citation omitted)." *Willis*, *supra* at 230.

Appellant argues that the trial court's determination of compelling need was based on an insufficient expertise in analyzing the controlling factors, because "[o]ne judge, one man alone, unqualified in behavioral sciences, made the determination, without additional facts or opinions, that the alleged victim could not testify in open court." Contrary to appellant's view, decisions such as this fall precisely within the judicial role. The trial court did not abuse its discretion in this case, and based its determination of compelling need on appropriate factors.

For the forgoing reasons, the judgment of the Boyd Circuit Court is affirmed.

All concur.

APPENDIX B

SUPREME COURT OF KENTUCKY
96-SC-1136-MR

JAMES E. DANNER

APPELLANT

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE

NO. 96-CR-00010

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING

Appellant, James E. Danner, was convicted in the Boyd Circuit Court of two counts of sodomy in the first degree, and one count of rape in the first degree. He was sentenced to twenty-four years imprisonment. He appeals as a matter of right.

The victim of appellant's sex crimes was his daughter. She was between the ages of five and tem years old when the appellant sexually abused her, but not fifteen by the time appellant was brought to trial. Because the Commonwealth felt that the victim could not testify in the presence of appellant, it sought to have her testimony taken outside appellant's presence pursuant to KRS 421.350. The Commonwealth moved for an in camera interview with the

victim so that the court could determine whether there was "compelling need" for the victim to testify through closed circuit television or taped video recording pursuant to that statute. Appellant objected, arguing that the fifteen year old victim was too old under the statute to be allowed to testify outside of the courtroom, and even if not, that the Commonwealth had failed to establish the required compelling need for her testimony to be taken in that manner.

The trial court granted the Commonwealth's motion and interviewed the victim in camera. After the interview, the trial court determined that compelling need was shown and allowed the victim to testify through closed circuit television.

I. THE AGE PROVISION OF THE STATUTE

The first issue if whether the age provision of KRS 421.350 refers to the age of the victim when the crime was committed or when the testimony is given. See generally, *Commonwealth of Kentucky v. Willis, KY*., 716 S. W. 2d 224 (1986). KRS 421.350 (1) defines the class of persons allowed to testify outside of the presence of the accused:

> 421.350 **Testimony of child alleged victim of illegal sexual activity**
>
> (1) This section applies to only a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.030 to 529.050. 529.070, 530.020, 530.060, 5303064, 531.310, 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12)years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnessed one of the offenses included in this subsection.

The Commonwealth and appellant disagree on when the age determination is to be made. The Commonwealth focuses on the age of the victim at the time the crime was committed, and contends that since the victim in this case was under twelve when the crimes were committed against her, she should be allowed benefit of the statute. Appellant focuses on the age of the victim at the time of trial, and counters that a victim who is older than twelve at the time of trial can not so testify.

As applied to the facts of this case, the statute must be regarded as ambiguous. One portion clearly refers to the age of the victim when the act is committed, but another portion refers to the age of the victim when the testimony is given. The statute assumes that the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect the child victim twelve years and under when the crimes were committed against them and who remain children[1] at the time of trial. The statute does not preclude this interpretation and its language focuses on the age of the child when the crime was committed: "(t)his section applies.....when the act is alleged to have been committed against a child twelve years of age or younger...." KRS 421.350 (1). To hold otherwise would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes

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[1] Although "child" is not defined for the purpose of KRS Chapter 421, "child" has been defined in other KRS sections as a person who has not yet reached her eighteenth birthday. KRS 15.900, KRS 199.011, and KRS 600.020

were committed but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.[2]

II. THE TRIAL COURT'S FINDINGS OF COMPELLING NEED

The trail court's inquiry does not end with an age determination. Rather, the court must also find compelling need for such procedures, as required by KRS 421.350 (2), (3) before the child victim will be allowed to testify as per the statute. This Court has enumerated certain factors a trial court should consider in making a compelling need determination: "the trial court must have wide discretion to consider the age and demeanor of the child witness, the nature if the offense and the likely impact of testimony in court or facing the defendant." *Commonwealth v. Willis, KY.*, 716 S. W. 2d, 230 (1986) (emphases added). Other factors a trial court should consider when making a compelling need determination, especially in a case where the child is older than twelve, are the age of victim, and the time which has elapsed from the crime to the date of trial.

The trial court has broad discretion in this area. The "presentation of evidence" is within the sound discretion if the trial judge, and will not be disturbed absent abuse if discretion. *Moore v. Commonwealth*, KY., 771 S.W. 2d 34, 38, (1989), cert. den, *Moore v. Kentucky*, 494 U.S. 1060

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[2] This statute is in line with the special treatment Kentucky courts have long afforded child witnesses. *See Meredith v. Commonwealth*, 265 KY. 380, 96 S.W. 2d 1049 (1936); *Commonwealth v. Willis, Ky.*, 716 S.W. 2d 224 (1986). The statute itself was recently broadened so that now, in addition to child victims, child witnesses may also testify outside of the presence of the accused. 1996 Ky. Acts ch. 178, sec 1, effective July 15, 1996.

(1990). Abuse of discretion could be found where a child was allowed to testify outside the presence of the accused provided "the prosecution {was} unable to show any necessity for the use if the statute." *Willis, supra* at 229-230.

In the case at bar, the trial court interviewed the child victim in camera, and then determined that compelling need justified the use of KRS 421.350 procedures. The trial court considered the testimony the child would give at trial, and the age of the child in making its determination. The Court stated: ". . . the Court is convinced that due to the nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded." The trial court was convinced that the c\victim would not be able to testify in the presence of the appellant, and in the interest of presenting all evidence to the jury it made the determination of compelling need:

> the compelling need is not based on convenience or comfort level of the witness so much as it is the need to be able to disclose the testimony so that the jury itself can determine whether they want to accept or reject same or what weight should be given.

This Court has similarly held that where the trial judge found that the child would not testify as to the offence and was reluctant to testify in the presence of the accused, that ". . . putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony. (citation omitted)." *Willis, supra* at 230.

Appellant argues that the trial court's determination of compelling need was based on an insufficient expertise in

analyzing the controlling factors, because "[o]ne judge, one man alone, unqualified in behavioral sciences, made the determination, without additional facts or opinions, that the alleged victim could not testify in open court." Contrary to appellant's view, decisions such as this fall precisely within the judicial role. The trial court did not abuse its discretion in this case, and based its determination of compelling need on appropriate factors.

For the foregoing reason, the judgement of the Boyd Circuit Court of affirmed.

All concur.

For Appellant:

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1008 First American Bank Building
PO Box 1455
Ashland, KY 41105-1455

For Appellee:

A.B. Chandler III
Attorney General

Dina Abby Jones
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601

APPENDIX C

COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
CRIMINAL ACTION: 96-CR-00010

COMMONWEALTH OF KENTUCKY
PLAINTIFF

vs:

JAMES DANNER
DEFENDANT

MOTION

Comes now the Commonwealth, through its undersigned counsel, and moves , pursuant to KRS 421.350, for an in-camera interview with the child, and for an order permitting the child's testimony to be taken either via close circuit television, or by video tape.

In support whereof, the Commonwealth states that the Indictment charges a sexual offense against a child less than 12 years of age, and that there is a compelling necessity to take the testimony in accordance with the statute in order that the jury may fairly may fairly hear all the evidence available.

J. Stewart Schneider
Commonwealth's Attorney,
32nd Judicial Circuit

The undersigned hereby certifies that the foregoing was served upon:

Hon. Michael J. Curtis
1544 Winchester Avenue
P. O. Box 1455
Ashland, Kentucky 41105-1455

by mailing a true and correct copy hereof, postage pre-paid, on October 30, 1996.

APPENDIX D

COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
CASE NO. 96-CR-00010

COMMONWEALTH OF KENTUCKY,
PLAINTIFF,

VS.

JAMES DANNER,
DEFENDANT.

RESPONSE

****

Comes now the Defendant, by and through counsel, and moves the Court to overrule the Commonwealth's Motion to be able to be allowed to take the deposition of the victim or any other child based on KRS 421.350.

As this writer understands the Commonwealth's Motion, the Commonwealth seeks to be able to take the video deposition of Shanda Danner. What the Commonwealth failed to inform the Court is that Shanda Danner at the time that she testified before the Grand Jury was 14-1/2 years old. KRS 421.350 (1) the use of television cameras to present testimony in a sexual abuse case of a victim under the age of 12 so that the child may not be aware of the Defendant's presence. See, *George v. Commonwealth*, 885 S. W. 2d 938. Ky. (1994), page 940.

Furthermore, there has been no showing by the Commonwealth that there is a compelling need. In *George*, Supra, the Commonwealth sought to produce a child's testimony outside the Defendant's presence and the

Commonwealth called Dorothy Keller, a psychiatric nurse with a degree in social work. Her testimony basically consisted that the child could testify in her father's presence, but that the child would be more traumatized than the average child by doing so. The psychiatric nurse further testified that her main concern was the future of the family dynamic, i.e., how the family would relate to one another after the child testified. Furthermore, this psychiatric nurse related that while the child expressed anxiety and dread, that the child was not fearful and could testify in open court. In *George*, it was apparent that the Trial Court failed to use the standard of a compelling need which is necessary to use TV testimony as the alternative to obtaining truthful testimony from the child. The Kentucky statute does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful. *George*, *Supra* 940, 941.

The foremost case in the Commonwealth on video testimony is *Commonwealth v. Willis*, Ky., 716 S.W. 2d 224 (1986), the Kentucky Supreme Court upheld the right to use the video tape procedure shielding the child from face to face consultation with the accused, by only in specified, narrow circumscribe circumstances. As such the test for using the video tape alternative should no be the sensibilities of the witnesses, nor even testimony regarding short term psychiatric trauma or emotional distress. The case of the video tape testimony does not turn on the witnesses discomfort, or stress and anxiety. See *George*, page 942.

In *Maryland v. Craig*, 497 U.S. 836, at 849 (1990), the United States Supreme Court has specifically held that state interest in protecting a child witness from the trauma of testifying in a child sexual abuse case justifies use of special procedures, like close circuit television, allowing the child to testify without confronting the Defendant face to face. *Id.* at

855. Before using a special procedure, the Trial Court must hear evidence and make a case - specific finding that use of a special procedure is necessary to protect the welfare of a particular child witness who seeks to testify. *Id.* The Trial Court must also find that the child would be traumatized by testifying in the Defendant's presence, and this emotional distress is more than mere nervousness, excitement, or some reluctance to testify. *Id.* At 856. The Court cannot presume trauma without a hearing and that is exactly what the Commonwealth wants in the above styled action.

WHEREFORE, the Defendant prays that the Court overrules the Commonwealth's Motion.

MICHAEL J. CURTIS LAW OFFICE

HON. MICHAEL J. CURTIS
P. O. BOX 1455
ASHLAND, KY 41105-1455
(606) 324-5435

This is to certify that a true and correct copy of the foregoing Response has been hand delivered upon:

Hon. J. Stewart Schneider
Courthouse
Catlettsburg, Ky 41129

This the____ day of November, 1996.

Michael J. Curtis

APPENDIX E

COMMONWEALTH OF KENTUCKY
32ND. JUDICIAL DISTRICT
BOYD CIRCUIT COURT

COMMONWEALTH OF KENTUCKY,
PLAINTIFF,

VS.

JAMES ARTHUR DANNER
DEFENDANT.

FINAL JUDGEMENT
SENTENCING OF IMPRISONMENT
INDICTMENT NO. 96-CR-00010
ON THE CHARGE(S) OF :
COUNT I, FIRST DEGREE SODOMY
COUNT II, FIRST DEGREE SODOMY
COUNT III, FIRST DEGREE RAPE

****

SOCIAL SECURITY NO. 407-88-0727
DATE OF BIRTH 2-17-61

The jury having found the Defendant guilty and on the 8th day of November 1996, the Court having adjudged that the Defendant was guilty of the crime(s) of Count , First Degree Sodomy; Count II, First degree Sodomy; Count III, First Degree Rape, it is

Noted that on this the 13th day of December 1996, the defendant, James Arthur Danner, appeared in open court with his attorney, Hon, Michael J. Curtis, and the Court inquired of the defendant and his counsel whether they had any legal

cause why judgement should not be propounded, and afforded the defendant and his counsel and opportunity to make the statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration tot he written report of the presentence investigation prepared by the Division of Probation and Parole, and the nature and circumstances of the crimes, the history, character, and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because there is a substantial risk that during a period of probation or conditional discharge the defendant will commit another crime; that the defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; that probation in the matter will unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why Judgement should not be pronounced, sentence was imposed by the Court upon the defendant, and IT IS THEREFORE ORDERED AND ADJUDGED by the Court that the defendant is guilty of the crime(s) Count I, First Degree Sodomy; Count II, First Degree Sodomy; Count III, First Degree Rape, and that he (she) shall be confined in the State Penitentiary for a maximum term of TWENTY FOUR (24) YEARS ON COUNT I; TWENTY FOUR (24) YEARS ON COUNT II; TWENTY FOUR (24) YEARS ON COUNT III, to run concurrently with each other, and

IT IS FURTHER ORDERED AND ADJUDGED that the Boyd County Sheriff and guard shall deliver the defendant to the custody of the Cabinet of Correctional hereunder at such location within this State as the Cabinet shall designate; it is

FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with the time spent in custody

prior tot he commencement of sentence, namely 47 days, towards the service of the maximum term of imprisonment.

_____JUDGE

BOYD CIRCUIT COURT, DIVISION II

I have served this judgement by mailing on the day and date hereinafter set out a true and correct copy to each of the following parties:

Commonwealth Attorney
Box 491
Catlettsburg, KY 41129

Sheriff, Boyd County
Courthouse
Catlettsburg, KY 41129

Office of Probation and Parole
PO Box 259
Catlettsburg, KY 41129

Roederer Correctional Complex
3001 W. Hwy 146
LaGrange, KY 40031

Jailer, Boyd County
Catlettsburg, KY 41129

Michael J. Curtis
PO Box 1455
Ashland, KY 41105-1455

This the ____ day of December, 1996.

CLERK, BOYD CIRCUIT COURT

BY: _____, D.C.

APPENDIX F

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 223--WITNESSES AND EVIDENCE

Current through P.L. 105-165, approved 3-20-98

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.--For purposes of this section--

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be--

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or

outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated--

(A) sexual intercourse, including sexual contact in the manner of genital- genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to live in-court testimony.--

(1) Child's live testimony by 2-way closed circuit television.--

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed- circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are--

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) Persons necessary to operate the closed-circuit television equipment;

(iii) A judicial officer, appointed by the court; and

(iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.--

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B) **(i)** Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are--

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the

deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) Handling of videotape.--The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a

protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) Competency examinations.--

(1) Effect on Federal Rules of Evidence.--Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

(2) Presumption.--A child is presumed to be competent.

(3) Requirement of written motion.--A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

(4) Requirement of compelling reasons.--A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

(5) Persons permitted to be present.--The only persons who may be permitted to be present at a competency examination are--

(A) the judge;

(B) the attorney for the Government;

(C) the attorney for the defendant;

(D) a court reporter; and

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.--The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) Psychological and psychiatric examinations.--Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.--

(1) Confidentiality of information.--(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall--

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to--

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal.--All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court--

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) Protective orders.--(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may--

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

(4) Disclosure of information.--This subsection does not prohibit disclosure of the name of or other information concerning a child to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

(e) Closing the courtroom.--When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly

tailored to serve the Government's specific compelling interest.

(f) Victim impact statement.--In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

(g) Use of multidisciplinary child abuse teams.--

(1) In general.--A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) Role of multidisciplinary child abuse teams.--The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including--

(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory

tests, and related services, as needed, and documentation of findings;

(B) telephone consultation services in emergencies and in other situations;

(C) medical evaluations related to abuse or neglect;

(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.--

(1) In general.--The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) **Duties of guardian ad litem.**--A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) **Immunities.**--A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) **Adult attendant.**--A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) **Speedy trial.**--In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) **Stay of civil action.**--If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) **Testimonial aids.**--The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

Supreme Court, U.S.
FILED
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No. 97-2057

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES DANNER — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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No. 97-2057

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES DANNER **PETITIONER**

versus

COMMONWEALTH OF KENTUCKY **RESPONDENT**

The Attorney General of the Commonwealth of Kentucky as counsel for Respondent states in opposition to James Danner's Petition for Writ of Certiorari to the Supreme Court of Kentucky as follows:

COUNTERSTATEMENT OF THE CASE

On February 9, 1996, the Boyd County Grand Jury returned an indictment charging petitioner, James Danner, with two counts of first degree sodomy and one count of first degree rape. (TR I, 11-13). Petitioner entered a plea of not guilty (TR I, 18-19) and was tried by a jury in November, 1996.

Prior to the trial of petitioner's case, the Commonwealth moved to allow the victim, petitioner's daughter, to testify outside of

the presence of the defendant pursuant to Ky. Rev. Stat. 421.350. (TR II, 40). In support of its motion, the Commonwealth asked the trial court to conduct an in camera interview with the victim in order to determine whether or not a compelling need existed to permit her testimony via closed circuit television. (TE I, 17). Petitioner opposed the Commonwealth's motion, alleging that Ky. Rev. Stat. 421.350 did not apply to S.D.[1], as she was 15 at the time of trial. (TE I, 8, 11). Further, petitioner contended that a finding of compelling necessity could not be based on an in camera interview with the victim by the trial court. (TE I, 11).

The trial court interviewed S.D. in camera. During the interview, S.D. said repeatedly that she would not be able to testify in the presence of the defendant:

> Q. Do you think you could get up there on the witness stand and answer the lawyers questions in there -- right in there in court like -- just like a grown up would do?
>
> A. No.

---

[1]In keeping with the policy of the Office of the Attorney General and the Kentucky Supreme Court, the victim of sexual offenses will be referred to only by her initials in order to protect her identity.

> Q. You don't think you can do it?
>
> A. No.
>
> . . .
>
> Q. Is it something other than just being nervous or what is it about being in the room with him?
>
> A. I just can't stand to be in a room with him.
>
> Q. Well. It's kind of a hard thing to do. And you're telling me you don't think you could do it in there in the same room with him?
>
> A. No.
>
> Q. What do you think would happen if you tried?
>
> A. I couldn't do it.

(TE I, 57-58).

Based on the in camera interview with S.D., the trial court granted the Commonwealth's motion and permitted S.D. to testify by closed circuit television, finding that denial of the motion would inhibit the jury's search for the truth. The trial court stated, in pertinent part:

> And although I'm not making this decision simply for the witness's convenience, or to prevent her from being nervous or anxious, as that no doubt happens to all witnesses, the Court is convinced that due to the

> nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to such a degree that the jury's search for the truth would be clouded.

(TE I, 60).

At trial, S.D. testified that petitioner began to have sex with her when she was five years old. On some occasions, petitioner would come into her room while she was sleeping, take off her clothes, force her legs apart and put his penis into her vagina. On one occasion, petitioner took S.D. and her brother, Michael, for a drive. Parking on a deserted road, petitioner told Michael to stay at the car and pick up some glass in the road while petitioner and S.D. went for a walk. Petitioner then took S.D. behind some bushes and raped her. S.D. testified that she tried to call out for help, but petitioner put his hand over her mouth. (Videotape Exhibit).[2]

In addition to raping S.D., petitioner also sodomized his daughter, both orally and anally. S.D. testified that on at least one

---

[2]The testimony of S.D. is not transcribed in the record of this case. It appears on a videotape as an exhibit. Unfortunately, the tape does not contain a counter from which specific citations can be taken. As such, the Commonwealth can only cite to the tape as a whole for references to S.D.'s testimony.

occasion petitioner sent Michael out of the house. Alone with S.D., petitioner told the child to go into the bedroom, followed her there, and put his penis into her mouth. On another occasion, while her mother was gone and Michael was out of the house, S.D. climbed on a table in an attempt to get away from petitioner. Petitioner held her down and inserted his erect penis into her anus. S.D. testified that this caused her quite a bit of pain and some bleeding. She screamed, but no one heard her. (Videotape Exhibit).

S.D. told the jury that petitioner sexually abused her from the time she was five until he moved out of the house when she was nine years old. Petitioner told S.D. that having sex with her was the only way he could love her. (Videotape Exhibit).

Dr. Ann Craig, a pediatrician, examined S.D. after S.D. disclosed that she had been raped and sodomized by petitioner. Dr. Craig's examination revealed deep clefts in the hymen. These findings were consistent with a penetrating injury occurring before the onset of puberty. (TE I, 78).

Following the close of the Commonwealth's case, petitioner asked for an additional finding by the trial court regarding the

compelling need for application of Ky. Rev. Stat. 421.350. The trial court again explained why it was necessary to allow S.D. to testify via closed circuit television:

> I'll rule again, as I did before, that I -- I believe that probably the best way to do that -- and if I'm wrong about this, I'm sure I'll be corrected, but I believe the best way to make that determination is with an in camera interview of the child. And once that is accomplished, I think it's one of those areas where the trial court has to use its discretion. . . . I tried real hard to get her to testify the conventional way. Keeping in mind now I wasn't letting her dictate to the Court whether we were going to go under 421.350 or whether we were going to go the old fashion [sic] way. Wasn't let her dictate that at all. I was trying to persuade her in that direction to see how resistant she was to it. Because I thought that was a pretty good barometer of whether or not it could be done. . . . I mean it just was very obvious to me that if I didn't apply the procedures that was spelled out there in 421.350 that the Commonwealth wasn't even going to be able to put on their side of the case. And believe me, I did it as a last resort. . . and there isn't any doubt in my mind that this was one of the -- if it's ever appropriate, it was appropriate this time.

(TE I, 149-150).

Petitioner was convicted of one count of rape in the first degree and two counts of sodomy in the first degree. He was sentenced to 24 years on each count, said sentences to run

concurrently for a total of 24 years imprisonment. Final judgment was entered on December 16, 1996. (TR III, 121-123).

Petitioner sought review of his conviction in the Kentucky Supreme Court. Petitioner based his plea for reversal on the trial court's decision to allow S.D. to testify via closed circuit television. Specifically, petitioner contended (a) that the trial court erred in allowing a 15 year old victim to testify by closed circuit television; (b) that the in camera interview with the victim did not form a sufficient evidentiary basis to support the trial court's ruling allowing testimony by closed circuit television; and (3) that the use of closed circuit television violated petitioner's Sixth Amendment right to confront his accuser.

In a published opinion rendered February 19, 1998, the Kentucky Supreme Court unanimously affirmed petitioner's conviction, finding that the trial court properly allowed S.D. to testify via closed circuit television. Danner v. Commonwealth, 963 S.W.2d 632 (Ky. 1998). With respect to the age of the victim, the Court noted that the statute in question, Ky. Rev. Stat. 421.350 was designed to protect victims who are under 12 years of age at the time the crimes

against them are committed and who remain "children", i.e. under the age of 18, at the time of trial. As such, the Kentucky Supreme Court found it proper for the trial court to allow a 15 year old victim to testify via closed circuit television regarding acts which occurred when she was between the ages of five and nine. Id. at 634.

Petitioner now requests that this Court grant certiorari.

ARGUMENT

PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT ABRIDGED IN ANY WAY BY THE APPLICATION OF KY. REV. STAT. 421.350 IN THIS CASE.

Petitioner raises three basic issues with respect the testimony of S.D. in this case. Petitioner attacks the evidentiary basis of the trial court's ruling allowing S.D. to testify via closed circuit television. Petitioner complains that the trial court erred in allowing closed circuit television testimony for a victim who was 15 years of age at the time of trial. Finally, petitioner asserts that the opinion of the Kentucky Supreme Court conflicts with decisions of this Court and the United States Court of Appeals for the Sixth Circuit. Each of

petitioner's three complaints will be addressed below, although none has any merit.

A. Federal Constitutional Standards for Closed Circuit Television Testimony - Maryland v. Craig.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

U.S. Const. amend VI. In Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), this Court considered the constitutional validity of a Maryland statutory procedure which allowed child victims of sexual abuse to testify via closed circuit television. Craig squarely presented the issue of whether face-to-face confrontation is an absolute requirement of the Confrontation Clause. The Court concluded that face-to-face confrontation, while preferred, must "'occasionally give way to considerations of public policy and the necessities of the case.'" 497 U.S. at 849 (citations omitted). Recognizing a legitimate state interest in the protection of child

witnesses, the Court approved the use of special procedures which allow a child to testify without face-to-face confrontation:

> Accordingly, we hold that, if the State makes and adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 854.

The finding of necessity to invoke the special closed circuit television procedures must be case specific, requiring a finding by the trial court that special procedures are necessary to protect a particular child witness. Id. The trial court must find that it is the presence of the defendant that would traumatize the child and that the emotional distress would be more than de minimis. 497 U.S. at 855-856.[3]

[3]The Court specifically declined to establish a minimum level of trauma required for the use of closed circuit television. However, the Court noted that Maryland's standard, requiring a trial court determination that the child will suffer "'serious emotional distress such that the child cannot reasonably communicate,'"(citation omitted) was sufficient to pass constitutional muster. Id. at 856.

Concluding its analysis of the Maryland procedures in the context of the Confrontation Clause, the Court stated:

> So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a state from using a one way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.

Id. at 860.

B. Kentucky's Closed Circuit Television Statute - Ky. Rev. Stat. 421.350.

Kentucky, like Maryland, has enacted a statute designed to advance the legitimate state interest in the protection of children who have suffered or witnessed acts of sexual assault. Ky. Rev. Stat. 421.350 operates to allow child victims and witnesses of certain crimes to testify outside the presence of a defendant upon a showing of "compelling need." The definition of "compelling need" is set forth in Ky. Rev. Stat. 421.350(5):

> "[C]ompelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

The statute was enacted, much like the one in Maryland, because the Kentucky General Assembly felt the protection of child victims was a legitimate state interest:

> Our legislature, after extensive public hearings on the matter of child sex abuse and responding to a plea for witness protection, has accepted the philosophy that testifying in a formal court room atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for children. Exercising the legitimate right of legislative policy making, the statute in question was enacted.

Commonwealth v. Willis, 716 S.W.2d 224, 227 (Ky. 1986).

C. The Evidentiary Sufficiency of the Trial Court's Decision to Allow S.D. to Testify in Accordance With Ky. Rev. Stat. 421.350.

Petitioner complains that his Sixth Amendment rights were violated because the trial court in instant case did not take expert testimony on the level of trauma S.D. would suffer if she was forced to testify in the presence of petitioner. In making this argument, petitioner wholly ignores the fact that neither the statute at issue, Ky. Rev. Stat. 421.350 or this Court's decision in Craig require expert testimony. In Craig, the trial court made its decision solely on the basis of expert testimony. The Maryland Court of Appeals reversed

the judgment of the trial court in part because it found error in the trial court's failure to question any of the children. 497 U.S. at 859. Reversing the Maryland Court of Appeals, this Court specifically stated, "we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." 497 U.S. at 860. Contrary to petitioner's assertions, federal constitutional law does not require the taking of expert testimony.

In this case, the trial court did exactly what is dictated by Craig: conduct a case specific analysis to determine if the presence of the defendant would traumatize the particular child witness to such a degree that use of closed circuit television was necessary. S.D. testified repeatedly that it was the presence of the defendant that unnerved her. At no time did she indicate that it was the courtroom which upset her. Further, she told the judge repeatedly that she could not testify in the presence of the defendant. Far from the effect of the defendant's presence being de minimis, the trial court specifically found that the Commonwealth would not be able to present its case without using closed circuit television. The trial court

concluded that the jury's fact finding function would be impeded if S.D. was not permitted to testify outside of petitioner's presence.

In Danner v. Commonwealth, the Kentucky Supreme Court noted that the trial court had properly applied the dictates of Ky. Rev. Stat. 421.350 in determining that the closed circuit procedure was necessary:

> The trial court considered the testimony the child would give at trial, and the age of the child in making its determination. The Court stated: ". . . the Court is convinced that due to the nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded." The trial court was convinced that the victim would not be able to testify in the presence of appellant, and in the interest of presenting all evidence to the jury it made the determination of compelling need. . . .

963 S.W.2d at 635.

The trial court in this case had a sufficient evidentiary basis for concluding that closed circuit television testimony was necessary in the instant case. The Kentucky Supreme Court reviewed that decision and found that the trial court followed the requirements Ky. Rev. Stat. 421.350. Petitioner's specious arguments to the contrary should be rejected and the petition should be denied.

D. The Determination that Ky. Rev. Stat. 421.350 Applies to Victims Under the Age of 18 at the Time of Trial is A Question of State Law.

Petitioner complains that the trial court erred in allowing S.D., who was 15 at the time of trial to testify via closed circuit television. Petitioner argued to the Kentucky Supreme Court, as he does to this Court, that the statute in question, Ky. Rev. Stat. 421.350 applies only to children under the age of 12. The statute states, in pertinent part:

> This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.130 to 529.050, 529.070, 530.020, 530.060, 530.064, 531.310, 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

Ky. Rev. Stat. 421.350(1). The Commonwealth argued that, for purposes of child victims, the only relevant time frame for application of the statute is when the acts are alleged to have been committed. By its express terms, the statute applies when the acts are alleged to have occurred when the victim was 12 or under. The

Kentucky Supreme Court found the statute to be ambiguous on its face, but concluded that the relevant time frame was when the acts were committed. In so holding, the Court noted that the statute would protect "child victims twelve and under when the crimes were committed and who remain children at the time of trial." 963 S.W.2d at 634(footnote omitted).[4]

Clearly, the decision of the Kentucky Supreme Court interpreting the scope of Ky. Rev. Stat. 421.350 is a question of state law over which this Court has no jurisdiction. 28 U.S.C. § 1257, in pertinent part, provides for jurisdiction over state court decisions "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . " The determination by the Kentucky Supreme Court that the Kentucky General Assembly meant the

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[4]The Kentucky Supreme Court noted that other provisions of Kentucky's statutory scheme define "child" as someone who has not attained his eighteenth birthday. Thus, the parade of horrors argument presented by petitioner, where 25 year old witnesses would be permitted to testify via closed circuit television (Petition, p. 10) simply would not happen as those witnesses would not be "children" at the time of trial. Danner, 963 S.W.2d at 634, n. 1.

statute in question to apply to children who are victimized at or before age 12 but are under 18 at the time of trial does not implicate a federal question. Because there is no jurisdiction, certiorari should be denied.

To the extent that this issue could possibly implicate the Sixth Amendment, Respondent notes that petitioner has provided this Court with no citation to authority which would indicate that the Kentucky Supreme Court's decision to apply its statute to children under age 18 violates the Sixth Amendment. Indeed, the Maryland statute at issue in Craig defines a child as a person who not yet 18 years of age. Md. Ann. Code art. 27 § 774; art. 27 §35C(a)(3) (1997). Petitioner's Sixth Amendment rights were not violated by a decision of Kentucky's highest court, construing a state statute, in a manner entirely consistent with the opinions of this Court. Certiorari should be denied.

E. The Decision of The Kentucky Supreme Court is Entirely Consistent With Relevant Precedent.

Finally, petitioner maintains that the decision of the Kentucky Supreme Court is "repugnant" to the rulings of this Court

and the United States Court of Appeals for the Sixth Circuit. (Petition, p. 12). This is ridiculous. As Respondent has already demonstrated, the decision of the Kentucky Supreme Court complies fully with the directives set forth by this Court in Maryland v. Craig. There is simply no inconsistency between the opinion in this case and the opinion in Craig. Neither the Kentucky statute at issue or the Kentucky Supreme Court's interpretation thereof abridged or denied petitioner's Sixth Amendment rights in any way.

Unable to demonstrate an inconsistency with the Craig opinion, petitioner asserts that the Kentucky Supreme Court failed to follow the Sixth Circuit case of United States v. Moses, 137 F.3d 894 (1998). In Moses, the Sixth Circuit reversed a sexual abuse conviction where the child was allowed to testify via closed circuit television. In so doing, the Court was interpreting a federal statute, 18 U.S.C. § 3509, enacted by Congress and inapplicable in the courts of the Commonwealth of Kentucky. The Sixth Circuit's conclusion that the trial court in Moses did not comply with the dictates of the federal statute simply has no bearing on petitioner's case. Certiorari should be denied.

CONCLUSION

The decision of the Kentucky Supreme Court in Danner v. Commonwealth simply does not conflict with the opinion of this Court in Maryland v. Craig. Petitioner has wholly failed to show that the statute at issue, Ky. Rev. Stat. 421.350, or its application in the instant case, violated his Sixth Amendment right to confront his accusers. As such, the petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

JAMES ARTHUR DANNER *v.* KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 97–2057. Decided November 16, 1998

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Sixth Amendment guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him." In this case, the Kentucky Supreme Court deprived James Danner of that right in defending against a prosecution for raping and sodomizing his daughter, because the victim of the asserted crime, now 15 years of age, vaguely protested that she could not be near him. The trial court conducted the following inquiry:

"Q. Why is it that him being there in the room would make you unable to tell your side?

"A: I don't know. I just can't. I just can't be near him.

"Q. We've already talked about that you're not afraid of him, are you?

"A. No.

"Q. I know it's difficult to exactly put a finger on what it is about; but why do you think that you could tell when he's not in the room but you couldn't tell it with him in the room?

"A. I don't know. I just can't be near him. I don't know why. I just can't.

"Q. Do you think that if you were to try and you know if we had to take breaks or something, you would be able to do it?

"A. I don't know." Pet. for Cert. 7.

Even though the witness had expressly disclaimed fear of the defendant, the trial court concluded:

> "'The Court finds that due to factors which I cannot define but yet go much further than anxiety or nervousness, as referred to the various cases that have been cited, that compelling need exists for the use of the electronic equipment. And though I am not making this decision simply for the witnesses *[sic]* convenience, or to prevent her from being nervous or anxious, as that no doubt happens to all witnesses, the Court is convinced that due to the nature of [the] testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded.'" *Id.*, at 7–8.

The Kentucky Supreme Court affirmed Danner's conviction. 963 S. W. 2d 632 (1998). Although petitioner objected that this procedure violated his constitutional right to confront his accuser, neither the trial court nor the Supreme Court so much as mentioned the Sixth Amendment.

Maryland v. *Craig*, 497 U. S. 836, 857 (1990), holds that a State may allow child witnesses in abuse cases to testify outside the presence of the defendant if "necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate . . ." *Id.*, at 7–8. The child witnesses in *Craig* were presumably all around the age of the principal child witness, who was seven. See *Craig* v. *State*, 316 Md. 551, 555–556, 560 A. 2d 1120, 1122 (1989). Experts testified at trial that one child "wouldn't be able to communicate effectively," another "would probably stop talking and . . . withdraw and curl up," another would "become highly agitated, that he may refuse to talk or if he did talk, that

he would choose his subject regardless of the questions," and another would "become extremely timid and unwilling to talk." *Craig*, *supra*, at 842 (internal quotation marks omitted.

I believe *Craig* was wrongly decided, since the confrontation guaranteed by the Sixth Amendment covers all witnesses in (as the text says) "*all* criminal prosecutions." (Emphasis added.) See 497 U. S. at 860 (Scalia, J., dissenting). This case, however, comes nowhere close to fitting within *Craig*'s limited exception. Far from being rendered mute with fear at the prospect of facing her father, Danner's daughter did not even rule out the possibility of testifying if she could take breaks from the witness stand. Moreover, *Craig* hardly contemplates that the child-witness exception is available to 15-year olds.

But for the precedent of *Craig*, the present case would be such an obvious and blatant violation of the Sixth Amendment that it would warrant summary reversal. Given *Craig*, however, it should be reviewed on certiorari and reversed to make clear that the exception we have created to the text of the Sixth Amendment is a narrow one. It is a dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime particularly reprehensible. Indeed, the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense.